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Supreme Court of the United States

October Term 1938.

No. 195.

SOCONY-VACUUM OIL COMPANY, INC.,

Petitioner,

—against—

HERBERT A. SMITH, JR.,

Respondent.

BRIEF FOR RESPONDENT.

GEORGE J. ENGELMAN,
Attorney for Respondent.

THE COURT PRESS, N. Y. C.

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—against—

HERBERT A. SMITH, JR.,
Respondent.

BRIEF FOR RESPONDENT.

Statement of the Case.

Respondent's Job, Experience and Ability.

Respondent was employed as an oiler; every twenty minutes during his watch it was his job to determine if the L. P. or low pressure bearing and journal of the ship's engine required lubrication (R. 24).

All of respondent's experience at sea had been in petitioner's employ. He took his first job at sea in petitioner's employ as a fireman on February 2, 1934; he was promoted to the rank of wiper on November 20, 1934, and to the rank of oiler on December 30, 1934, which was about five months prior to the accident, although he did not work steadily as his ship was laid up during part of the time (R. 21-22). His rapid promotion clearly indicates his ability.

The Low Pressure Bearing and Journal.

The low pressure bearing is one thing and the low pressure journal is another. Many of the witnesses referred to the bearing and journal as one and the same thing; they are not and the distinction is important. The journal is that part of the crank-shaft which rotates against the bearing. The bearing is that which encloses and supports part of the crank-shaft and that part of the crank-shaft which is enclosed and supported by the bearing is called the journal (R. 160-162, 229). The bearing is fitted around the journal to within 1/10,000ths of an inch and as the latter revolves both require lubrication (R. 214). Consequently, every twenty minutes it was respondent's duty to make an inspection.

On Defendant's Exhibit J (R. 252) the line above the Fig. 2 indicates the length of the bearing; as the bearing is enclosed in the bed plate indicated by the same Fig. 2, the only part of the bearing visible is the edge of the bearing indicated by the Fig. 8; the dotted line indicates the visible part of the crank-shaft and where it continues through and inside the bearing as indicated by the length of the bearing line, it is called the journal (R. 204-205).

There is a hole or opening indicated by the Fig. 3 on Plaintiff's Exhibit 1 (R. 247) which goes through the bed plate or bearing support, and through the bearing as well, directly to the journal (R. 160-161).

How the Accident Occurred.

Respondent testified that he stood with his right foot on the step-plate marked Fig. 1 and with his left foot on the bed plate marked Fig. 2, that with his

left hand he held onto the slush-pan marked Fig. 4 as he placed his right hand down into the hole or opening marked Fig. 3 to feel the "low pressure journal"; all figures marked on Plaintiff's Exhibit 1 (R. 247); in using the term "journal" he did not use it in a technical sense by referring to the part of the crank-shaft which rotates against the bearing but he referred to the bearing itself which is made of alloy (R. 24), for at the bottom of the hole in which he placed his hand he could feel the bearing as well as the revolving crank-shaft or Journal (R. 149). He said that there was a bracket or strut which ran from the angle-iron marked by the Letter A on Plaintiff's Exhibit 1 (R. 247) and by the Letter Z on Plaintiff's Exhibit 2 (R. 248) to the underside of the step-plate; that the bracket or strut had become loose and it projected out beyond the step-plate and after he made his inspection and brought his left foot back to the step-plate, he was tripped by the loose bracket and precipitated into the pit or bilge, *i. e.*, the opening or space between the points indicated by the Letters S and L on Plaintiff's Exhibit 2 (R. 248), (R. 25-30).

Respondent said the bracket was loose two to three weeks prior to the accident at which time he reported the condition to the first assistant engineer (R. 29-30), however, there is no proof that at the time respondent went on the step-plate the loose bracket was projecting out beyond the edge of the step-plate so as to be visible to him, in fact it is an inference from respondent's testimony that with the vibration of the ship the loose bracket moved out beyond the edge of the step-plate while he was on it (R. 67).

Petitioner's Contention.

Below.

Petitioner contended below:

(1) That the step-plate was intended for use only when the ship was in port in order to reach overhead in cleaning, wiping and repairing the engines (R. 146, 192, 199).

(2) That respondent should have done the job while standing on the floor plates holding a grab-iron marked Fig. 3 and feeling the edge of the bearing marked Fig. 8; all figures marked on Defendant's Exhibit J (R. 252), (R. 147, 157).

On the basis of these contentions, petitioner sought to invoke the defense of assumption of risk below.

On This Appeal.

It appears from petitioner's brief that the contention to be urged on this appeal is that respondent had a REAL CHOICE between safe equipment and unsafe equipment in doing his job, and that he assumed the risk because he VOLUNTARILY chose the unsafe equipment.

Argument.

I.

If the defense of assumption of risk is available in an action under the Jones Act[1] petitioner had the burden of proving it below and failed to do so.

The defense of assumption of risk must be pleaded and proved by the party asserting it.[2] And the proof does not support the proposed rule of assumption of risk laid down in "Petitioner's Contention on this Appeal".

Petitioner offered no proof:

(1) That respondent or any of the other oilers were ordered or instructed to avoid the use of the step-plate except when the ship was in port.

(2) That respondent or any of the other oilers were ordered or instructed to do the job the way the petitioner contends it should have been done.

(3) That it promulgated any rules, instructions or orders with respect to the performance of the job.

(4) That there was any established custom and practice on the ship or on ships having similar engines to avoid the use of the step-plate except when the ship was in port and to do the job the way petitioner contends it should have been done.

Respondent's superior, the first assistant engineer, testified that he never instructed respondent with re-

[1] Section 33 of the Merchant Marine Act of 1920, U. S. C. A., Title 46, Sec. 688.

[2] *Sunday Creek Co.* v. *Gray*, 238 Fed. 325 (C. C. A. 4th, 1916).

spect to the job, that he saw respondent do the job prior to the accident but could not recall how he did it, he said that it must have been done correctly as he did not reprimand respondent (R. 189). The same witness testified that not one of the four engineers comprising the entire licensed personnel of the engine department gave any instructions to the oilers in connection with the performance of the job and the use of the step-plate (R. 194-195). Petitioner offered no evidence that it promulgated or enforced any orders, rules or regulations requiring the oilers to avoid the step-plate except when the ship was in port and to do the job by feeling the edge of the bearing rather than by feeling it through the hole in the bed plate. Petitioner did not elicit the testimony of a single oiler to support its contention.

The only proof elicited by the petitioner in support of its contention is the testimony of the chief engineer, the third assistant engineer, the first assistant engineer and one expert. They all testified that respondent should have avoided the step-plate and felt the edge of the bearing, however, judicial notice has been taken of the fact that officers, when testifying stick with their ship.[1] The testimony of the engineers was nothing more than opinion evidence, for they did not testify to any custom and practice by the ship's oilers in support of petitioner's contention, and as the engineers did not oil, no custom and practice was proved; it is obvious that there was none, for the first assistant engineer admitted that he had seen oilers do the job in different ways, and when he testified that he had seen oilers do the job without using the grab-iron (R. 187) petitioner's contention took a lethal blow,

[1] *The Iadien*, 71 Fed. (2d) 752 (C. C. A. 9th, 1934).

as it did when petitioner's expert testified that the grab-iron was for use when the ship was rolling (R. 198).

And petitioner offered no evidence of custom and practice on other vessels with similar engines, to support its contention.

In view of this state of the proof, the presence of the step-plate within the restricted limits of respondent's place of work in close proximity to the bearing and its obvious adaptability to the performance of the job, most certainly invited and led respondent to use it. Certainly respondent could not anticipate that the step-plate was intended only for use when the ship was in port. Petitioner's contention with respect to the use of the step-plate taxes credulity to the extreme, in view of the fact that it was only a foot above the floor plate and only 10 to 12 inches in length (R. 201), and the record is barren of any explanation as to how the step-plate would aid in the work for which petitioner contends it was intended.

At the time of the occurrence of the accident respondent was doing the job the way he had been taught in petitioner's employ (R. 63). He became accustomed to do the job that way and he always did it the same way (R. 65).

By its contention petitioner divides the small and confined place of work into a safe place and an unsafe place and places upon respondent the burden of making the division, although, in the light of the proof, petitioner did nothing to make it apparent. It is a fair inference from respondent's testimony that no choice of working places was apparent to him at the time he met with the accident, for when

he testified that he could not reach the bearing while standing on the floor plates and holding the grab-iron (R. 62-63), he was not referring to the edge of the bearing but to the center of the bearing in the hole at the bottom of the bed plate, for he testified, "You couldn't get down in 8 or 9 inches unless you were a contortionist". There is no proof that at the time of the accident petitioner knew that he could do the job by feeling the edge of the bearing.

The proof indicates that petitioner did nothing to present the choice of another way of doing the job, that it is doubtful whether such choice was apparent to respondent, and that if it was apparent to him, he was not free to make a purely voluntary choice, for he was influenced by what he had been taught in petitioner's employ and by the presence and adaptability of the step-plate at the place of work.

And the matter of a purely voluntary choice would seem to involve the relative merits of the way respondent did the job and the way petitioner contends he should have done it.

Respondent by placing his hand in the hole in the bed plate and reaching down to the bearing could determine by the color of the oil on his fingers whether the bearing was beginning to gripe and need lubrication (R. 24). At that point, the center of the bearing, the color of the oil as well as the heat of the bearing would indicate the need for lubrication. Petitioner contends that it is enough to feel the edge of the bearing, but at that point the need for lubrication can be determined only by the heat of the bearing. By the color of the oil respondent was able to determine the need for lubrication before it was reflected in a hot bearing and possible damage to the

ship's engine. Certainly respondent's way of doing the job was more thorough and efficient.

Respondent's reach from finger tips to finger tips is 61 inches (R. 54); the hole in the bed plate leading to the journal was 8 to 10 inches in depth (R. 25); petitioner's own expert testified that the distance from the grab-iron to the top of the hole was 51 inches (R. 205). The loss of reach in grasping the grab-iron in one hand, and in bending the other hand and arm and reaching 8 to 10 inches into the hole, makes it apparent that it was impossible to hold the grab-iron and feel the bearing at the bottom of the hole (R. 62).

There is no evidence that respondent could have stood at any place save the step-plate in order to feel the bearing through the hole. Petitioner, although it produced an expert who had made measurements, offered no proof that respondent could have done the job that way without using the step-plate. In fact it appears obvious from Plaintiff's Exhibits 1 and 2 (R. 247-248), that it is extremely hazardous if not impossible to reach over to the hole indicated by the Fig. 3 and reach 8 to 10 inches down into the hole to the bearing and journal without using the step-plate, for the presence of the step-plate would certainly interfere if not prevent it.

The way petitioner contends the job should have been done was not without dangers. In order to hold the grab-iron with one hand and touch the edge of the bearing with the other, respondent would have to reach over the open bilge and assume a stretching position. Respondent appreciated these dangers (R. 62) and petitioner's witness, the first assistant engineer, admitted them (R. 152).

If a choice was apparent to respondent, it appears that he was compelled to weigh the relative dangers and merits of the two ways of doing the job; under such circumstances his choice could not be purely voluntary. It is apparent that the Circuit Court of Appeals had this state of the proof in mind when in the opinion below it stated that, "a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice". But it is not conceded that respondent made a careless choice, for he did the job in the most thorough and efficient way.

II.

Under the Maritime Law the shipowner has an absolute obligation to provide safe equipment.

The loose bracket was defective equipment and constituted unseaworthiness.[1] Under the maritime law, before the Jones Act and after, there has always been an absolute obligation on the part of the shipowner to provide a seaworthy vessel. In *Panama Ry. Co.* v. *Johnson,* this Court[2] affirmed the Circuit Court (Second Circuit)[3] where that Court held:

> "The maritime law imposed upon the shipowner the risk incident to the use of defective and dangerous appliances, and we see nothing in the new legislation which changes the law in this regard. * * * What the law previously was is stated by this Court in *Cricket* v. *Parry* * * *

[1] *Storgard* v. *France & Canada S. S. Corporation,* 263 Fed. 545 (C. C. A. 2nd, 1920).

[2] (1924) 264 U. S. 375, 68 L. Ed. 748.

[3] 289 Fed. 964 (C. C. A. 2nd, 1923).

in which we held that a shipowner cannot avoid liability for injury to a seaman by a defective and dangerous appliance, on the ground that the seaman knew of the defect when he shipped. We declared in that case that, if a shipowner supplied a defective and dangerous appliance when a proper one could not be obtained, he did so at his own risk and not at the risk of the seaman."

III.

Before the Jones Act assumption of risk was not recognized as a defense in suits by seamen to recover for injuries due to defective equipment.

Prior to the Jones Act a seaman assumed only the risks incident to his perilous calling.[1] He never assumed the risk of defective equipment; in *The Arizona* case[2] this Court in referring to suits by seamen under the maritime law prior to the Jones Act to recover for injuries due to defective equipment said:

> "But no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available."

And the defense of assumption of risk was not recognized where a seaman had a real choice between safe equipment and unsafe equipment and voluntarily chose the latter. *Olson* v. *Flavel*,[3] there a mate chose

[1] *The Iroquois* (1904), 194 U. S. 240, 48 L. Ed. 955.

[2] *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.

[3] 34 Fed. 477 (D. C. 1888).

to take coal aboard by means of a narrow plank and a defective wheelbarrow when a safe iron chute was available for performing the task. The Court indicated that the libelant could have avoided the accident, but held that his conduct constituted contributory negligence which was not a bar to recovery and said:

> "The third point made in support of this defense is that the mate had the choice of methods in putting the coal on board, and that, having adopted the dangerous one, he was guilty of negligence, and must bear the consequences. In other words, he might have used the chute, or constructed a gangway of greater width out of the plank at his service, on the wharf; and, if the barrows were out of order, he might have informed the master of the fact, so that others could have been obtained.
>
> * * *
>
> "On the whole, my judgment is that the libelant is not blameless in the matter. He should have put the coal on with the chute or constructed a safer gangway to wheel on.
>
> * * *
>
> "This is the first time the question has been made in this court, and I feel justified, in the light of the authorities cited, to follow the leading of my own judgment, and hold that contributory negligence is not a bar to a suit in admiralty, for damages arising from a personal injury. For whatever may be said by the sages of the common law, about the difficulty in such cases of determining 'whose wrong-doing weighed most in the compound that occasioned the mischief', it is not just to leave a seaman to suffer, without redress, all the consequences of an injury caused by the fault of his employers as well as his own."

And where a seaman voluntarily places defective equipment to a use, for which it was obviously not constructed and intended and which the shipowner was not able to anticipate, the defense was not available even though safe equipment was set up and available for the work at hand, *Storgard* v. *France & Canada S. S. Corporation.*[1] That was an action under the general maritime law before the Jones Act; there the seaman used a ring connected with one of the sails in ascending the mast; he was injured by a worn and defective bolt on the ring and he did not have to use the defective ring in ascending the mast. The Trial Court charged the jury that the shipowner was not liable unless it could have reasonably foreseen the use of the ring and the occurrence of the accident. The Circuit Court (Second Circuit) held the charge improper, reversed the judgment for the defendant and said:

> "If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

IV.

The Jones Act did not make the defense of assumption of risk available in a suit by a seaman to recover for injuries due to defective equipment. No case since the Jones Act has recognized assumption of risk as a defense to such a suit.

While the defense of assumption of risk was never recognized in a suit by a seaman to recover for injuries due to defective equipment before the Jones

[1] *Supra.*

Act, the question arises did the Act make the defense available? This Court considered that question and answered it in the negative in *The Arizona* case[1] where it said:

> "But the Jones Act does not, by its own terms, or by those adopted by reference from the Employers' Liability Act, prescribe that assumption of risk shall be a defense to the liability imposed for injuries to seamen on navigable waters, or, apart from the specific references to the fellow servant and contributory negligence rules, purport to enlarge or modify the defenses available in maritime law to suits brought to recover for such injuries. In the absence of such a definite command the scope of the new rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system.
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> * * *
>
> "* * * No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. Such has been the conclusion reached generally by the lower federal courts, although not with entire unanimity."

While the defense of assumption of risk has been recognized and invoked in some few cases on which petitioner relies, in not one of these cases was the injury due to defective equipment.

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[1] *Supra.*

In *Holm* v. *Cities Service Transportation Co.*[1], the plaintiff was a third mate and while he was in charge of loading the vessel with a cargo of oil, pools of oil accumulated on the deck which was a necessary concomitant to loading, he knew of this condition and while he was off duty, he went aft for a drink of water by means of a safe deck and then elected to return to his quarters by means of the oily deck and was injured. The Court said:

> "So a seaman off duty who has gone for a drink of water and decides to return to his room over a deck he knows is slippery and may have oil collected in pools upon it, when he knows there is a safe though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice."

Holm was free from the compulsion and restraint of duty and two clearly separate, marked and defined routes, the condition of which he knew, were open to him, under these circumstances he was not confronted with a problem of choice, for the safe route was the only natural way to proceed.

In *Johnson* v. *United States*[2], the decedent was off duty and was proceeding forward to supper by means of the open well deck which was obviously dangerous because of heavy seas; the crew had been admonished not to go over the open well deck but to use the safe shaft tunnel in rough weather. The Circuit Court (Second Circuit) held that decedent assumed the risk. This case presents the same considerations as *Holm* v. *Cities Service Transportation Co.*[3], except that the decedent disregarded admonitions to avoid

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[1] 60 Fed. (2d) 721 (C. C. A. 2nd, 1932).

[2] 74 Fed. (2d) 703 (C. C. A. 2nd, 1935).

[3] *Supra.*

the dangerous well deck, which is an added factor for invoking the defense of assumption of risk.

In *Scheffler* v. *Moran Towing & Transportation Co.*[1], libelant was a day time employee and the morning he went aboard on the day of the accident he knew the tug was shorthanded and that he would be required to tend certain lines during the day, although he was employed as a cook. The Circuit Court of Appeals (Second Circuit) held that he assumed the risk on the ground that he had the alternative of quitting the morning he came aboard as his status was not that of a seaman but similar to that of a longshoreman. The Court stated:

> "* * * nor does it excuse those who, though strictly speaking they are seamen, are employed upon harbor craft, on which they serve only during the day, leaving each night to go home, and renewing their work every morning, like any shore workmen. Such men are in the position of longshoremen or other casual workers on the water * * *."

The same Court reached the same conclusion under similar circumstances in *Skolar* v. *Lehigh Valley R. Co.*[2]. As these cases involved maritime employees whose status was akin to that of shore workmen, no rules of assumption of risk applicable to a seaman's case were laid down. The principle that an opportunity to quit the vessel and abandon an unsafe working place invokes the defense of assumption of risk in the case of seamen was reversed by this Court in *Beadle* v. *Spencer*[3], where it was stated:

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[1] 68 Fed. (2d) 11 (C. C. A. 2nd, 1933).

[2] 60 Fed. (2d) 893 (C. C. A. 2nd, 1932).

[3] (1936), 298 U. S. 124, 80 L. Ed. 1082.

"Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained."

And in *Cricket S. S. Co.* v. *Parry*[1], it was held that a seaman does not assume the risk of defective equipment even though he ships with knowledge of the condition. The Circuit Court of Appeals (Second Circuit), stated:

"The defendant contends that the plaintiff cannot recover because he shipped with knowledge of the condition complained of, and because, so far as the wire rope is concerned, proper rope could not be obtained. Two decisions of this court are cited in support of the first proposition, * * *. We do not think them applicable because the plaintiffs were shore servants, in the first a longshoreman, and in the second a railroad hand. We are considering the rights of seamen, who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are the wards of admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew of it."

In *Hunt* v. *Hobbs Wall & Co.*[2], the decedent was en-

[1] 263 Fed. 523 (C. C. A. 2nd, 1920).

[2] 42 Fed. (2d) 437 (C. C. A. 9th, 1930).

gaged in raising a timber from the hold and in order to free it he went out on a beam running across the open hatch which was part of the framework of the ship, leaned forward and attempted to free the timber with a hook and as he struck at the timber with the hook he missed it, lost his balance and fell into the hold. He was held to have assumed the risk involved in the use of the beam on the ground that he could have freed the timber very easily without using the beam. But the case gives petitioner no support for the reason that the beam was not defective in any respect, the accident was caused wholly and solely through the carelessness of the decedent on the beam. The opinion of the Court indicates that a different result might have been reached had the beam been defective. The Court said:

> "The fact that after it was installed it was used occasionally, or was usually used by the crew as a short cut across the hatch, has no bearing on the accident, which was caused by the unusual position of the decedent and not by any structural defect of the beam."

In *Tampa Interocean S. S. Co.* v. *Jorgensen*[1], the plaintiff was proceeding below to cover a 'tween deck hatch; two routes were available to him to reach his destination, one of the routes had been made unsafe by the stowage of cargo, although it was held that the cargo had not been negligently stowed; a temporary ladder had been rigged leading to the safe route, a permanent ladder led to the dangerous route. The plaintiff was not warned to avoid the permanent ladder and had no knowledge that the route leading from it was dangerous by reason of the cargo; he took

[1] 93 Fed. (2d) 927 (C. C. A. 5th, 1938).

the dangerous route and was injured. The trial judge modified defendant's request to charge as to assumption of risk and charged in part:

> "* * * *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

Plaintiff had judgment, it was affirmed and held that the trial judge properly modified defendant's request. No defective equipment was involved. Like the *Holm* case[1], a deck became unsafe through taking cargo aboard and a choice of separate paths or routes to a given destination was present; the only substantial difference being that Jorgensen had no knowledge that the path or route he took was dangerous, but it was held that unless he had such knowledge he did not assume the risk. Except for the fact that Jorgensen was on watch, the rule derived from the case is no broader than that of the *Holm* case.

Only in the *Hunt* case[2] was the seaman subject to the coercion involved in the performance of a task and there the task was a simple one—raising timber; but the case does not involve the principle in the "choice cases", for the accident did not occur because Hunt chose to go on the beam, it occurred solely through his carelessness on it. Like the *Scheffler*[3]

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[1] *Supra.*

[2] *Supra.*

[3] *Supra.*

and *Skolar*[1] cases, it may be disregarded in arriving at a conclusion or rule laid down by the "choice cases".

In the *Jorgensen* case[2] the seaman was on duty, but he was proceeding to his place of work, so that he was not subject to the coercion involved in performing a task, and as in the *Holm*[3] and *Johnson*[4] cases, the choice was between clearly separate paths or routes to a destination. In the last two mentioned cases the seaman was off watch and not even subject to the compulsion and restraint of duty.

It is certain that in an action by a seaman to recover for personal injuries, the defense of assumption of risk has never been recognized in cases based on defective equipment or where the seaman, while engaged in the performance of a job, had a choice between a safe working place and an unsafe working place and chose the latter. The defense has been restricted to cases where there was a choice between separate paths or routes leading to a destination and where the seaman knew one route was safe and the other unsafe, and while subject to no compulsion and restraint, he voluntarily elected to take the unsafe route.

In the light of the proof as pointed out *supra* (pp. 5-10) and the authorities, it is apparent that petitioner's contention is supported by neither reason nor authority.

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[1] *Supra.*

[2] *Supra.*

[3] *Supra.*

[4] *Supra.*

V.

Petitioner's contention was submitted to the jury.

A.

BY THE CHARGE OF THE COURT THAT RESPONDENT COULD NOT RECOVER UNLESS PETITIONER WAS NEGLIGENT.

The trial judge charged in substance, that there could be no recovery unless the petitioner was negligent, that petitioner owed respondent the duty of providing him with a safe place in which to work and with safe tools and appliances at his place of work, and that if the breach of either or both of those duties was a proximate cause of the accident, the respondent could recover (R. 234, 238, 239, 241). On the trial petitioner urged, as it does here, that it did provide a safe place to work, but respondent did not choose to use it. In finding against the petitioner the jury necessarily found that no safe place of work was provided, and that finding quashed petitioner's contention, for if no safe place to work was provided, then respondent had no choice.

B.

BY THE CHARGE OF THE COURT ON THE COMPARATIVE OR CONTRIBUTORY NEGLIGENCE RULE.

The Court charged the jury fully on the comparative or contributory negligence rule in a "Jones Act" case (R. 240). In a seaman's case a choice between a safe place to work and an unsafe place to work, raises an issue of contributory negligence and not assumption of risk. In *Olson* v. *Flavel*,[1] where un-

[1] *Supra.*

safe equipment was selected as against safe equipment, the comparative negligence rule was the basis for arriving at a conclusion. And it has been applied to the case of a shore workman who had a choice between two methods of doing his work and chose the more hazardous;[1] there the Court stated:

> "The defendant argues that there was open to the plaintiff a choice between two methods of doing the work and that the plaintiff chose the more hazardous. This argument is properly addressed to an issue of contributory negligence which does not appear to have been raised. Moreover, no showing was made that in the ordinary course of his duties the position taken by the plaintiff was one which he was not entitled to choose. He was obliged to take an appropriate position to perform his duties in braking the string about to be disconnected and the testimony of the defendant's witnesses shows that his position was known to them. The contention is therefore answered by the foregoing decisions in connection with the question of assumption of risk. Under these cases, in the absence of any warning or notice that the position taken was unusually hazardous, any unusual risk attendant thereon was not assumed by the plaintiff."

Petitioner's contention seeks to hold respondent wholly at fault. In view of the many alternatives respondent had to weigh at his place of work as already pointed out *supra* (pp. 5-10), it was for the jury to determine "whose wrong-doing weighed most in the compound that occasioned the mischief" and proportion the damages accordingly.

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[1] *Devaney* v. *Atchison, T. & S. F. R. Co.* (Supreme Court of California, 1933), 219 Cal. 487, 27 P. (2d) 635.

VI.

There should be no exception to the absolute obligation of the shipowner to provide a seaworthy vessel and safe equipment.

The shipowner has an absolute obligation to provide a seaworthy ship and safe equipment; the reasons for the rule are so obvious and have been stated so many times that no restatement is necessary. There should be no relaxation of that rule. Petitioner's contention would open the door by establishing an exception. If the shipowner can be excused for furnishing a defective appliance on the ground that the seaman could have avoided its use, particularly when it can be reasonably anticipated from the very nature of the appliance that the seaman may use it in performing his work, then the law will encourage the use of defective equipment and unseaworthiness. The result is obvious, the efficiency of the Merchant Marine will be greatly impaired.

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the judgment be affirmed.

Respectfully submitted,

GEORGE J. ENGELMAN,
Attorney for Respondent.

P. 2.

SUPREME COURT OF THE UNITED STATES.

No. 195.—October Term, 1938.

Socony-Vacuum Oil Company, Inc., Petitioner, vs. Herbert A. Smith, Jr. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.

Respondent, a seaman, brought the present suit in the District Court for southern New York to recover, under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, for an injury received from a fall in the engine room of petitioner's vessel. The fall was caused by a defective step on which respondent stood while on duty, when seeking to learn, by touching with his finger, whether an engine bearing was overheated.

In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence, instructing the jury that negligence of respondent contributing to the accident was not a bar to recovery but was to be considered in mitigation of damages. The court refused petitioner's request for an instruction that if respondent could have performed his duty without use of the defective step, he assumed the risk of injury from it. Instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance.

Judgment of the district court, upon a verdict in respondent's favor, was affirmed by the Court of Appeals for the Second Circuit, 96 F. (2d) 98, on authority of *The Arizona* v. *Anelich*, 298 U. S. 110, and *Beadle* v. *Spencer*, 298 U. S. 124. The court's decision was predicated upon its conclusion that respondent had free choice of a way to reach and touch the bearing, without standing on the de-

fective step, and it held that in the circumstances, and since the seaman had not used the defective appliance contrary to orders, the trial judge had correctly instructed the jury that assumption of risk was not a bar to recovery. We granted certiorari, — U. S. —, upon a petition asking us to review this ruling in the light of our decisions in *The Arizona* and the *Beadle* cases, *supra*, the question being one of public importance in the application of the maritime law as supplemented by the Jones Act.

A preliminary point, much discussed in brief and argument here, is whether the question ruled upon below is presented by the record. Respondent insists that there was no evidence from which the jury could conclude that there was a safe method known to him by which he could have reached the bearing without using the defective step and that he chose the unsafe instead of the safe method.

Respondent was employed as an oiler in petitioner's engine room. It was his duty while the vessel was under way to touch with his finger, at intervals of twenty minutes, a bearing of the propeller shaft, in order to ascertain whether it was overheating and in need of additional lubrication. Directly in front of the bearing, as he approached it, was an iron step, located about one foot above the engine room floor and bolted to the bedplate which supported the bearing. Petitioner testified that the step was braced on its underside by a bracket or strut, and that about two or three weeks before the accident he had observed that the bracket was loose and out of place and had reported the fact to a superior officer.

Respondent also gave the only account of what occurred at the time of the accident. He testified that in order to reach the bearing it was necessary for him and was his uniform practice to stand with his right foot upon the step with his left advanced and placed upon the bedplate, and with his left hand holding, for support, the upper edge of an adjacent vertical slush pan; that, standing in this position, he placed his right hand in a hole extending downward through the bearing cap a distance of eight or ten inches, where he touched the shaft and the adjoining bearing to discover whether they were overheated and to inspect the oil which stuck to his fingers and which, if discolored, would indicate that the journal was beginning to gripe because of excessive friction; that, as he stepped down his left foot struck the loose bracket, which had projected beyond the edge of the step, causing him to fall and suffer the injuries complained of. There was testimony by petitioner's witnesses, all denied by respondent, from which the jury

could have found that it was possible for respondent to have reached the bearing while standing on the floor, without the use of the defective step, by seizing with his right hand a grab iron located on a nearby column and reaching with his left hand to touch the left end of the bearing, which extended through the bedplate; that this was the usual and only appropriate way to examine the bearing, and that respondent had been seen to reach it in that manner. There was also testimony that other oilers had reached the bearing without using the step while standing on the floor, with right hand grasping the upper edge of the vertical crank-pit guard, which was adjacent on the right and nearer to the bearing than the grab iron. There was evidence of the relative localities of the several parts of the structure mentioned and of the distances between them, indicating that respondent could have reached the bearing, either at its left end or through the hole in the bearing cap, while standing on the engine room floor and without using the step.

We must accept the verdict as establishing the negligent failure of petitioner to furnish a safe appliance, the iron step, and that the plaintiff knew that it was defective at the time of the accident, for the only evidence of any breach of duty by petitioner was respondent's testimony that he knew of the defect and had reported it to the first assistant engineer two or three weeks before the accident. Upon all the evidence it was for the jury to say whether respondent was aware that in reaching the bearing with one hand, either at its end or through the hole in the bearing cap, he could avoid the use of the defective step by standing on the engine room floor and steadying himself by seizing with his right hand the grab iron or the crank-pit guard on his right, or by placing his left hand on the edge of the slush pan.

No specific instruction was asked or given as to what the verdict should be if the jury concluded that respondent had knowingly made such an election. Instead, the court charged generally "that the ship owner is under a duty to furnish the seaman with a safe place in which to work" and "There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties." Consequently, there is no basis for disturbing the judgment unless this charge is erroneous as applied to the evidence taken most favorably to petitioner.

The question whether assumption of risk is a ba. to a suit by a seaman to recover under the Jones Act for injuries caused by a

defective appliance, when he has a free choice to avoid the use of it, is a novel one in this Court. No such choice was involved in *The Arizona* or *Beadle* cases. There assumption of risk by the seaman, which would have barred recovery at common law, was concededly not a defense under the admiralty rule. The decision was that the Jones Act, in extending to seamen all the rights to recover for injuries resulting from defective appliances given to railway employees by the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, had left undisturbed the admiralty rule with respect to assumption of risk. In holding that the rule had not been changed, we did not consider the question now presented whether, within that rule, assumption of risk is a defense where the seaman could have avoided the use of the unsafe appliance by the free choice of a safe one.

Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for "failure to supply and to keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U. S. 158, 175; *The Arizona* v. *Anelich*, *supra*, 120 *et seq.* Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages. See *The Max Morris*, 137 U. S. 1; *The Arizona* v. *Anelich*, *supra*, 122, and cases cited. And no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available. *Halverson* v. *Nixen*, Fed. Cas. No. 9,570, 3 Sawy. 562; *The Edith Godden* (D. C.), 23 Fed. 43; *The Noddleburn* (D. C.), 28 Fed. 855; *Olson* v. *Flavel* (D. C.), 34 Fed. 477; *The A. Heaton* (C. C.), 43 Fed. 592; *The Julia Fowler* (D. C.), 49 Fed. 277; *Lafourche Packet Co.* v. *Henderson* (C. C. A.), 94 Fed. 871; *The Fullerton*, 167 Fed. 1; *Globe S. S. Co.* v. *Moss*, 245 Fed. 54; *The Colusa* (C. C. A.), 248 Fed. 21; *Cricket S. S. Co.* v. *Parry*, 263 Fed. 523; *Storgard* v. *France & Canada S. S. Corp.* 263 Fed. 545.

In some of these cases the seaman had voluntarily shipped on a vessel which he knew to be unseaworthy, *Cricket S. S. Co.* v. *Parry*, *supra*; see *Scheffler* v. *Moran Towing and Transportation Co.*, 68 F. (2d) 11, 12. In others it was apparent that the seaman had chosen to expose himself to the dangers of unsafe appliances when there was a safe alternative. *The Julia Fowler*, *supra*; *Olson* v. *Flavel*, *supra*.

In some cases arising after the Jones Act where the defense was allowed, the employee was thought to have had the status of a stevedore or shore worker and not that of a seaman. *The Maharajah*, 40 Fed. 784; *Cunard S. S. Co.* v. *Smith*, 255 Fed. 846; *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. (2d) 545; *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transportation Co., supra*, 12; *Yaconi* v. *Brady & Gioe, Inc.*, 246 N. Y. 300, 306. In *Johnson* v. *United States*, 74 F. (2d) 703, the seaman had made his choice in disobedience of orders, and in another where the defense was allowed the seaman, while not on duty, though in the course of his employment, had chosen to go into an unsafe part of the vessel, knowing that there was an alternative. *Helm* v. *Cities Service Co.*, 60 F. (2d) 721.[1]

Here respondent was a seaman; he was on duty when injured; and there was no evidence that he acted in disobedience of orders. In the absence of any controlling or persuasive authority we look to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate limits. Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed.

The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion.[2] In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action.

[1] In Tampa Interocean S. S. Co. v. Jorgensen, 93 F. (2d) 927, the Court of Appeals for the Fifth Circuit, in affirming a judgment in favor of seaman, took occasion to approve the following instruction by the trial court to the jury: "You are instructed that if the plaintiff was furnished two methods of entering the 'tween deck space, one obviously safe and the other obviously unsafe, and if the plaintiff knew the safe method and notwithstanding chose the unsafe method, the defendant is not liable".

[2] See R. S. § 4596, 46 U. S. C. § 701.

Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. *The Arizona* v. *Anelich, supra,* 123, and cases cited; *Calmar Steamship Corporation* v. *Taylor,* 303 U. S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380, 381; *Jamison* v. *Encarnacion,* 281 U. S. 635, 639; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375; *Warner* v. *Goltra,* 293 U. S. 155, 157.

Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner. See *The Wanderer,* 20 Fed. 140; *The Frank and Willie,* 45 Fed. 494; *John A. Roeblings Sons Co.* v. *Erickson,* 261 Fed. 986, 987; *Storgard* v. *France & Canada S. S. Corp.,* 263 Fed. 545. In either case the seaman's negligence is a contributing cause of his injury, without which the ship owner would be liable to the full extent of the damage.

The incongruity and practical embarrassments in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in *Olson* v. *Flavel, supra,* and *The Julia Fowler, supra,* where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper

basis for a substantial reduction of damages because of the negligence of the choice. In *The Julia Fowler, supra,* the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury.

Upon the facts of this case, there was no error in the charge of the trial court as to assumption of risk. Its instruction as to the application of the rule of comparative negligence was general and no exception was taken to it. Petitioner would have been entitled to a more specific instruction, if requested, as to the appropriate effect upon the amount of the verdict of the relative degrees of petitioner's and respondent's negligence if the jury should find that respondent had knowingly failed to choose an available safe method of doing his work.

We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty.

Affirmed.

Mr. Justice McReynolds thinks the petitioner's request for the charge in respect of assumption of risk should have been granted and that, for that reason, the challenged judgment should be reversed.

Mr. Justice Roberts took no part in the consideration or decision of this case.